STATE OF MARYLAND,	*	IN THE
v.	*	CIRCUIT COURT FOR
NICOLA RILEY,	*	CECIL COUNTY
Defendant.	*	Case No.: 07-K-11-002-084

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MOTION TO DIMISS INDICTMENT
AND STATEMENT OF POINTS AND AUTHORITIES

Dr. Nicola Riley, by and through her undersigned attorneys, hereby moves this Court pursuant to Maryland Rule 4-252 to dismiss the charges against her, and in support thereof states:

I. Statement of Facts

On or about December 28, 2011, Nicola I. Riley was arrested and removed from her home in Salt Lake City, Utah based on a warrant filed by the Elkton, Maryland Police Department. The warrant was based on a claim that Dr. Riley is a fugitive from charges contained in a sealed indictment returned in the Circuit Court for Cecil County, Maryland. Dr. Riley appeared in proceedings in Salt Lake City Utah and a Utah Court declined to set a bail. Through her Utah counsel, Dr. Riley waived extradition and is or will soon be scheduled to appear in Circuit Court for Cecil County. On January 5, 2012, undersigned counsel filed a Motion to Unseal the Indictment and Set Bail. Dr. Riley's Utah counsel received a copy of the indictment on January 6, 2012 and he shared a copy with undersigned counsel on that date. The indictment charges Dr. Riley with three counts as follows:

> FIRST COUNT
> The Grand Jury on its oath and affirmation charges that the aforesaid Defendant, on or about the aforesaid date, at the location aforesaid, in the County aforesaid, did feloniously, willfully, and of deliberately premeditated malice aforethought kill and murder the victim aforesaid, a viable fetus.

CR 2-201/CR 2-103; CJIS 2-0900 (Murder First Degree)

SECOND COUNT

The Grand Jury on its oath and affirmation charges that the aforesaid Defendant, on or about the aforesaid date, at the location aforesaid, in the County aforesaid, did feloniously, and of with malice aforethought kill and murder the victim aforesaid, a viable fetus.

CR 2-204/CR 2-103; CJIS 2-0999 (Murder Second Degree)

THIRD COUNT

The Grand Jury on its oath and affirmation charges that the aforesaid Defendant, on or about the aforesaid date, at the location aforesaid, in the County aforesaid, did conspire with Nicola Irene Riley to feloniously, willfully and of deliberately premeditated malice aforethought kill and murder the victim aforesaid, a viable fetus.

Common Law; CJIS 2C0900 (Con — Murder First Degree)[1]

Based on a press release issued by the Elkton Police Department while the indictments were still under seal by court order, the charges against Dr. Riley appear to have arisen from an incident on or about August 13, 2010 concerning a female patient brought to the emergency room at Union Hospital for treatment resulting from complications arising from an abortion procedure performed at a clinic in Elkton, Maryland. *See* Press Release by Elkton Police Department, attached as Exhibit A. The press release refers additional questions or inquiries to the Office of the State's Attorney for Cecil County, Deputy State's Attorney Kerwin Miller. In that police document and in this indictment, Dr. Riley, a licensed Maryland physician, is alleged to have been present at the premises and provided medical treatment — a lawful abortion — to an unnamed patient.

[1] By order of the Circuit Court for Cecil County dated January 4, 2012, the third count was amended. The amendment substituted the name "Steven Chase Brigham" for "Nicola Irene Riley" as the alleged co-conspirator. As discussed below, this amendment, based on an *ex parte* request to the court, improperly changed the character of the charging document without consent of the charged party in violation of Md. Rule 4-204.

II. Argument

Dr. Nicola Riley, a licensed Maryland physician, entitled to practice medicine in Maryland at the time of the events charged in the indictment, has been indicted for one count of first degree murder of a viable fetus, one count of second degree murder of a viable fetus, and one count of conspiracy to commit first degree murder of a viable fetus.

Maryland's laws provide several layers of statutory immunity for doctors performing abortions, a procedure that is also protected under the United States Constitution. Both the plain language of the statutes under which Dr. Riley is charged and the legislative history of the "fetal homicide" statute demonstrate that the General Assembly never intended for doctors to be prosecuted at all for performing abortions, let alone convicted and subjected to criminal penalty.

Because Maryland law expressly provides that a licensed physician performing an abortion is immune from criminal liability, the charges against Dr. Riley should be dismissed. Those charges all arise from an abortion procedure performed in Elkton, Maryland on or about August 13, 2010, actions for which Dr. Riley enjoys statutory immunity. *See State v. Holton*, 420 Md. 530, 543 (2011) (holding that an indictment asserting that the defendant engaged in conduct for which she had immunity should be dismissed for violating the statute conferring immunity).

Moreover, because under Maryland law a licensed Maryland physician such as Dr. Riley is immune from liability, any indictment would have to allege facts, if any such existed, that would nullify or overcome the immunity. This is so because allegations that would place the conduct within an exception to the immunity would be essential elements to each of the charged

crimes.[2] Maryland law requires "the charging document [to] contain the essential elements of the crime." *Brown v. State*, 44 Md. App. 71, 76. (1979). The bare bones indictment handed up by the grand jury makes no such allegations and is therefore insufficient.

In any event, to the extent that the fetal homicide statute applies to Dr. Riley's conduct, that statute and the one governing lawful abortions are unconstitutionally vague and therefore do not provide sufficient specificity to allow citizens to conform their behavior to the statutes. If the conduct described in the Elkton Police Department's report can be subject to prosecution under these statutes, it merely demonstrates that the statutes do not sufficiently describe the proscribed conduct and therefore chill constitutionally protected behavior, and placing an undue burden on a woman's right to terminate her pregnancy in private consultation with her doctor, under the Fourteenth Amendment of the United States Constitution.

A. Maryland's fetal homicide statute does not apply to abortion.

The Court of Appeals has clearly held that "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *City of Bowie v. Prince George's County*, 384 Md. 413, 426, 863 A.2d 976, 983 (2004) (quoting *Oaks v. Connors*, 339 Md. 24, 35, 660 A.2d 423, 429 (1995)). Both the plain language and the legislative history of Criminal Law § 2-103, Maryland's "fetal homicide" statute, clearly indicate that the statute was intended to combat domestic violence, not to subject either women who choose to have abortions or the doctors who perform them, to criminal prosecution.

As an initial matter, the plain language of Criminal Law § 2-103 indicates that it was not intended to apply to abortion. As discussed at length below, two provisions of the statute indicate that it does not apply to abortions: § 2-103(e) states "[n]othing in this section applies to

[2] If the essential elements of the crime are not expressly stated by the indictment, they must at a minimum be implied from the language used in the indictment. *See Jones v. State*, 303 Md. 323, 337 (1985). No such implications are found here.

or infringes on a woman's right to terminate a pregnancy . . ." and § 2-103(f) prohibits prosecution of a physician providing lawful medical care. These provisions together demonstrate that this statute was intended to address domestic violence, not abortion. A woman's right to terminate a pregnancy would be an empty right indeed if a licensed Maryland physician is chargeable with murder for assisting that woman in terminating her pregnancy.

The legislative history also clearly indicates that the State's prosecution of Dr. Riley is directly contrary to the General Assembly's intent in passing the statute. HB 398, the bill passed in 2005 that ultimately became Criminal Law § 2-103, was intended to create an enhanced penalty for domestic violence committed against a pregnant woman if she lost the fetus as a result of that violence. Indeed, the Floor Report from the Senate Judicial Proceedings Committee explicitly states, in the bill summary, "The bill does not apply to a woman's right to terminate a pregnancy . . . ." Exhibit B. Further, in a letter to the Chairman of the House Judiciary Committee, Delegate Charles R. Boutin, who sponsored the bill, stated that the bill was "clearly and *solely a victim's rights bill*. It takes care of the 'Laci Peterson' issue in Maryland, while protecting a woman's right to choose. Amendments to protect the mother or physician *from prosecution* are clearly friendly." Exhibit C (emphasis added). Indeed, the Court of Appeals has already recognized that the purpose of the exceptions in §§ 2-103(e)-(f) was to prevent the law from "encourag[ing] the policing of pregnancy." *See Kilmon v. State*, 394 Md. 168, 181, 905 A.2d 306, 313 (2006). To use this law as the State wishes in this case, to prosecute a doctor for performing an abortion for a patient who sought this medical care and consented to it, is therefore contrary to the intent of the legislature and is a gross abuse of the criminal justice system.

B. The indictment is legally insufficient and should be dismissed.

Even if the Court holds that Criminal Law § 2-103 can apply to abortions in certain circumstances, the indictment in this case is insufficient to charge a violation of that statute. The Maryland Declaration of Rights mandates that "in all criminal prosecutions, every man hath a right to be informed of the accusation against him . . . ." Md. Const. Decl. of Rts. Art. 21. This mandate is implemented by Maryland Rule 4-202. The "primary purpose" of an indictment is to fulfill that constitutional requirement. *Williams v. State*, 302 Md. 787, 791, 490 A.2d 1277, 1279 (1985). More specifically,

> [T]he purposes served by the constitutional requirement include (1) putting the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct; (2) protecting the accused from a future prosecution for the same offense; (3) enabling the accused to prepare for his trial; (4) providing a basis for the court to consider the legal sufficiency of the charging document; and (5) informing the court of the specific crime charged so that, if required, sentence may be pronounced in accordance with the right of the case.

Id. Every criminal charge "must provide such description of the criminal act alleged to have been committed as will inform the accused of the specific conduct with which he is charged . . . ." *Id.* Because the indictment charges crimes without also making allegations regarding the immunities explicitly granted to Dr. Riley by statute, it falls short of the requirement that it must put her on notice by characterizing her crime and conduct.

i. The indictment should be dismissed because Dr. Riley is immune from prosecution under the fetal homicide statute.

The first count of the indictment charges Dr. Riley with first degree murder of a viable fetus; the second count charges her with second degree murder of a viable fetus. Both counts cite Maryland's "fetal homicide" statute as the statutory basis for bringing charges for the death of a viable fetus. This statute provides in part: "Except as provided in subsections (d) through (f)

of this section, a prosecution may be instituted for murder or manslaughter of a viable fetus." Md. Code Ann., Crim. Law § 2-103(b). The critical exception cited in subsection (e) provides a broad immunity for physicians and other medical professionals:

> (e) Nothing in this section subjects a physician or other licensed medical professional to liability for fetal death that occurs in the course of administering lawful medical care.[3]

The State has charged Dr. Riley, a physician licensed to practice medicine in Maryland, with two counts of fetal homicide and one count of conspiracy to murder for the death of an allegedly viable fetus. As indicated in the Elkton Police Department's press release, although not set forth in the indictment itself, these charges relate to an incident during which Dr. Riley was administering an abortion procedure to a patient not named in the indictment. The fetal homicide statute explicitly exempts a physician from liability for fetal death that occurs in the course of administering lawful medical care. In Maryland, and in all the United States, abortion is a lawful medical procedure. *See Roe v. Wade*, 410 U.S. 113 (1973); *see also* Md. Code, Health-Gen. § 20-209 ("State interference with abortions"). Because the indictment is a criminal action brought against a defendant who enjoys statutory immunity to its charge, it should be dismissed. *See Holton*, 420 Md. at 543.

As discussed above, the legislative history indicates that a doctor performing abortions should never be subject to prosecution under the fetal homicide statute. Even if such a criminal action were within the contemplation of the legislature, in order to properly charge a physician who possesses statutory immunity from liability, as Dr. Riley does, the indictment must allege that the conditions upon which immunity is conferred are not present. That is, the indictment

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[3] Md. Code, Crim. Law § 2-103(c) also provides "Nothing in this section applies to or infringes on a woman's right to terminate a pregnancy as stated in § 20-209 of the Health--General Article." Subjecting doctors who perform abortions to criminal prosecution based on bare-bones indictment necessarily infringes upon all women's right to terminate a pregnancy.

falls short of charging an offense under Criminal Law § 2-103(e) both because it charges a defendant who is immune under the statute, and because it is facially insufficient due to the failure to allege that Dr. Riley should be excepted from immunity because the medical care administered during which the alleged death of a viable fetus occurred was unlawful. The text of Criminal Law § 2-103 indicates that the immunity granted is not an "exception" or "excuse" that may be raised by a defendant to answer charges. The statute specifically states that, subject to the immunity conferred upon a physician, a "prosecution may be instituted" for the fetal homicide. If the immunity applies, a prosecution may *not* be instituted — that is, it may not be commenced at all. This immunity is similar to that in the speech and debate clause that the Court of Appeals held rendered the defendant immune in *State v. Holton*. 420 Md. 530, 543 (2011) (dismissing charges based on the statutory provision in Md. Code, Courts and Judicial Proceedings § 5-501 that a "criminal action may not be brought" for specified conduct).

The State's vague charges reflect an attempt to intimidate any physician who might consider performing an abortion in Cecil County with the threat of criminal prosecution, effectively banning the constitutionally protected procedure. The Court should maintain a pleading standard whereby the State must address the immunities guaranteed to physician — only by doing so can the Court forestall this strategy of prosecuting out of existence a woman's constitutional right to terminate a pregnancy in private consultation with her physician.

ii. The indictment should be dismissed because Dr. Riley is immune from prosecution for performing an abortion under Md. Code, Health—General § 20-209.

Criminal Law § 2-103(a) also provides that "[f]or purposes of a prosecution under this title, "viable" has the meaning stated in § 20-209 of the Health-General Article." That very section, titled "State interference with abortions," provides a separate immunity for physicians who provide abortions.

> The physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion under this section made in good faith and in the physician's best medical judgment in accordance with accepted standards of medical practice.

Md. Code, Health-Gen. § 20-209(d).

As discussed above, both the text and the legislative history of Criminal Law § 2-103 indisputably exclude medical doctors who perform abortions from the purview of that statute. But, even if a physician could be charged with fetal homicide for performing an abortion, the immunity conferred by Health-Gen. § 20-209(d) requires the State to allege at a minimum that the decision to perform the abortion was made in bad faith, and was not made in the physician's best medical judgment in accordance with accepted standard of medical practice. The State must be held to meet this pleading standard; otherwise any doctor who has performed an abortion could be charged with fetal homicide and forced to answer the charge with evidence of her good faith and medical judgment in accordance with medical standards. Health-Gen. § 20-209 *restricts* the State's interference with abortions. Accordingly, to institute a prosecution of a doctor the State must be compelled to show probable cause that the immunity from interference conferred upon doctors should be denied in that particular case. As the State has not alleged that the statutory immunities of physicians should not apply in this instance, the charges against Dr. Riley must be dismissed.

C. Count Three of the indictment must be dismissed for additional reasons.

i. The conspiracy charge against Dr. Riley is facially insufficient because it charges a one-party conspiracy; if it does not, it was improperly amended.

The third and final count of the indictment alleges that Dr. Riley "did conspire with Nicola Irene Riley to feloniously, willfully and of deliberately premeditated malice aforethought kill and murder the victim aforesaid, a viable fetus."[4] The crime of conspiracy is a common law offense in Maryland, defined as "as the agreement between two or more people to achieve some unlawful purpose or to employ unlawful means in achieving a lawful purpose." *State v. Johnson*, 367 Md. 418, 424 (2002)(collecting cases). The "essence" of the crime of conspiracy is an "unlawful agreement." *Id.* As the Court of Appeals held, the unlawful agreement is "[a]t the core of the crime of conspiracy" and therefore "conspiracy requires two or more participants." *Id.* The indictment of Dr Riley charges her of conspiring with herself to murder a viable fetus. The charge thus lacks the essential element of conspiracy — an agreement between two or more people — and must be dismissed.

On or about January 4, 2012, a party, perhaps the State's Attorney, made an *ex parte* request that the indictment be amended to state that Dr. Riley conspired with Steven Chase Brigham to commit Murder in the First Degree. Under Maryland Rule 4-204, an indictment may only be amended without the consent of the defendant if it does not change "the character of the offense charged." An amendment changes the character of the offense when it "requires proof of an act different from the act originally charged," or "proof of *acts additional to those necessary to prove the offense originally charged.*" *Busch v. State*, 289 Md. 669, 678-79 (1981) (change

[4] As noted above, the Circuit Court for Cecil County improperly ordered the third count of the indictment amended by substituting the name "Steven Chase Brigham" for "Nicola Irene Riley" as the alleged co-conspirator.

from "hindering an officer in his official duties" to "resisting arrest" altered the character of the indictment because it required proof of an additional fact, namely proof of an arrest)(emphasis added).

The amended Count Three alleges that Dr. Riley conspired with Steven Chase Brigham, rather than with herself. It therefore changes the character of the offense charged because it transforms allegations that would be insufficient to state a charge for conspiracy (a one-person agreement) into allegations that would be sufficient (notwithstanding the insufficiencies otherwise discussed in this memorandum). With this change, the State has bootstrapped itself into a conspiracy charge without submitting a properly drafted charge to a grand jury, as required by Maryland Rule 4-211(d) and the Fifth Amendment of the United States Constitution.

ii. The conspiracy count must be dismissed because it alleges a conspiracy to perform an act which is not murder, and charges as a crime an act for which Dr. Riley is statutorily immune.

Even in the event that the indictment properly charged Dr. Riley with conspiring with Dr. Brigham, it would nevertheless lack the elements necessary to charge Dr. Riley with a crime. It appears from the charges that the State considers Dr. Riley and Dr. Brigham to have agreed to achieve the unlawful purpose of fetal homicide, thereby conspiring to commit to first degree murder. But the fetal homicide statute expressly forbids the institution of any prosecution of physicians for fetal death that occurs in the course of administering lawful medical care. Md. Code Ann., Crim. Law §§ 2-103(b), (e). The State cannot skirt this immunity by charging Dr. Riley with conspiracy.

As an initial matter, the fetal homicide statute does not authorize prosecution of any person for conspiracy. The statute expressly authorizes only a prosecution for murder or manslaughter of a viable fetus. No court has recognized conspiracy to murder a viable fetus as a common law crime — certainly not in Maryland. Before the fetal homicide was enacted in

Maryland, there was no such crime as murder or manslaughter of a viable fetus. *See Williams v. State*, 77 Md. App. 411 (1988) (adopting the common law "born alive" rule that homicide charges could only be brought for injuries sustained by a fetus that died after it was born alive). Accordingly, no conspiracy to fetal homicide could have existed at common law prior to the enactment of the statute. Nothing in the fetal homicide statute indicates that it has changed the common law to create a criminal offense of conspiracy to murder a viable fetus. Therefore, the conspiracy charge is facially invalid because it charges something which is not a crime.

It is also obvious that any conspiracy to perform an abortion would fall within the statutory immunity. For an abortion to proceed requires that the woman and the physician, both of whom are immune, agree. Criminalizing such an agreement would run afoul of the proscription in Health-Gen. § 20-209(d) and § 20-209(b) that "the State may not interfere with the decision of a woman to terminate a pregnancy").

Similarly, a physician who agrees to perform an abortion procedure in consultation with another physician, or complete an abortion procedure begun by another physician, must be shielded from liability for conspiracy by the same statutory immunity she would have had she acted alone. These decisions cannot be the basis for criminal liability without violating Health-Gen. § 20-209. The State has not alleged that Dr. Riley made any agreement related to performing abortion procedures in bad faith; nor has it alleged that she made any such agreement not in her best medical judgment or out of accordance with accepted standards of medical practice. This failure renders the indictment facially insufficient. Indeed, for the protections against State interference with abortions codified in Health-Gen. § 20-209 to have substance at all, the indictment must be facially deficient; otherwise the State could charge any doctor who has performed an abortion both with murder and with conspiring with her patient to murder a

fetus without probable cause that the doctor acted outside the scope of Health-Gen. § 20-209. Without such evidence, this prosecution requires Dr. Riley to offer proof of her own good faith and best medical judgment in order to escape from criminal jeopardy, thereby vitiating her presumption of innocence.

D. The statutes regulating abortion in Maryland are unconstitutional.

Maryland's fetal homicide and abortion statutes are unconstitutional because a) their vagueness violates Dr. Riley's right to due process of law under the Fifth Amendment of the United States Constitution, as incorporated by the Fourteenth Amendment of the United States Constitution, and b) because they place an undue burden on a woman's right to choose to terminate her pregnancy in private consultation with her doctor, under the Fourteenth Amendment of the United States Constitution.

It is a "basic principle of due process" that a criminal law is void for vagueness if it does not clearly proscribe the unlawful conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). There are multiple reasons for this rule. First, "[v]ague laws may trap the innocent by not providing fair warning." *Id.* This violates due process because "we insist that laws give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* Second, explicit standards ensure that those who enforce the laws cannot enforce them arbitrarily. *Id.* "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09. In some cases, the state may mitigate the vagueness of a criminal statute by including a scienter requirement to ensure that the actor knows that he is committing the crime. *See, e.g., Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994). But, courts must be particularly vigilant in assessing vague statutes where constitutionally protected rights are implicated at the boundaries of the

proscribed conduct. *See Grayned* 408, U.S. at 109; *Smith v. Goguen*, 415 U.S. 566, 573, (1974); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604 (1967).

Furthermore, as the Supreme Court has recognized repeatedly, criminal statutes that regulate the boundaries of constitutionally protected behavior should be held to the most stringent standard when a court assesses a vagueness challenge. Since *Roe v. Wade*, 410 U.S. 113 (1973), and then under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992), the Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment affords a woman the constitutional right to choose to terminate a pregnancy before viability, and that the state cannot create any "undue burden" on this right. *See id.* at 876. The *Casey* plurality explained that "[a] finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. Because of this constitutional protection, any state regulation on abortion must meet the "undue burden" standard.

In accordance with these principles, the Supreme Court has long acknowledged that statutes criminalizing abortion must be sufficiently specific to give the doctor performing the abortion "fair notice that his contemplated conduct is forbidden by statute." *See Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *see also Gonzalez v. Carhart*, 550 U.S. 124, 148-50, *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000); *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973). In *Colautti*, the Supreme Court held unconstitutional a statute that combined a subjective and objective standard in the physician's determination of whether or not a fetus was viable. *Colautti*, 439 U.S. at 394-95. The Court explained that such a standard was unconstitutional, first, because it does not clearly identify the standard with which the physician must comply, and

second, because it "subjects the physician to potential criminal liability without regard to fault." *Id.* at 391-92, 394. Because the statute's definition of viability was vague, a doctor could not conform his actions to the statute, and because the statute did not require that the doctor violate it willfully or recklessly to be subject to criminal prosecution, a physician could be convicted for performing an abortion where he or she acted in good faith, but the fetus was later determined to be viable. The statute was therefore unconstitutional.

The Supreme Court explained that the lack of a scienter requirement is particularly problematic in the abortion context:

> The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

Id. at 395-96. Criminal liability based on a standard of care, rather than on the doctor's state of mind is therefore, "a trap for those who act in good faith." *Id.* at 386 (quoting *United States v. Ragen*, 314 U.S. 513, (1942)).

The statutes the State claims Dr. Riley violated are unconstitutionally vague for the same reasons the Supreme Court recognized in *Colautti*. Considered in tandem, Criminal Law § 2-103, and Health-Gen. § 20-209, set forth multiple and conflicting standards by which a physician's conduct could be judged. At least three of the possible standards are "lawful medical care,"[5] "best medical judgment of the attending physician,"[6] and "good faith and in the physician's best medical judgment in accordance with accepted standards of medical practice."[7] The statute that is the basis of the indictment is therefore unconstitutionally vague under *Colautti*.

First, Criminal Law § 2-103 contains no definition of "lawful medical care." A physician subject to prosecution under this statute therefore has no way of knowing whether "lawful" means non-criminal, or whether it also includes a breach of the standard of care for which civil liability could attach.

Second, the Criminal Law § 2-103 defines "viable" with reference to Health-Gen. § 20-209, which bases the determination of viability solely on the judgment of the doctor. Under that standard alone, a doctor's subjective determination that a fetus was not viable would be conclusive. However, the immunity provision in that statute muddles the standard, adding an objective component that immunizes the doctor from criminal liability only where the decision to perform an abortion is made both in good faith and "in accordance with accepted standards of medical practice." It is therefore unclear whether the doctor's subjective determination that a fetus is not viable can protect him or her from prosecution under the fetal homicide statute (which only applies in the death of a viable fetus), or whether the State can come behind later, as

[5] Md. Code Ann., Crim. Law § 2-103.
[6] *Id.*
[7] Md. Code Ann., Health-Gen. §20-209.

they have here, and claim that the doctor's judgment was incorrect. Thus, like the *Colautti* statute, the statutes in play in this case do not provide a doctor sufficient notice of what conduct would subject him or her to criminal prosecution.

In addition, the criminal immunity provision in Health-Gen. §20-209 is problematic even in isolation because it incorporates the objective standard, which in the context of an ever-changing definition of viability, means a doctor can be held criminally liable for conduct that he or she made in good faith. As the Supreme Court recognized in *Coluatti*, the viability determination is subject to wide disagreement. It therefore is unconstitutional to subject a doctor to criminal liability for such a determination without any scienter requirement. Because the *Coluatti* Court held that the definition of viability in that case was unconstitutionally vague for other reasons, it did not explicitly reach the question of whether a combined subjective/objective standard could ever be sufficiently explicit to pass constitutional muster. The Sixth Circuit Court of Appeals, however, has held that it cannot. *See Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 197 (6th Cir. 1997) (cert. denied 523 U.S. 1036 (1998)).

In *Women's Medical Professional Corporation*, the vagueness in the statute concerned the definitions of a "medical emergency" and "medical necessity," not the definition of viability, but it applied an almost identical standard to Health-Gen. § 20-209(d). There, the Ohio statute required the physician make these determinations "in good faith and in the exercise of reasonable medical judgment" to avoid criminal prosecution. *Id.* at 204. The Sixth Circuit held this was unconstitutionally vague because "a physician need not act wil[l]fully or recklessly in determining whether a medical emergency or medical necessity exists in order to be held criminally or civilly liable; rather, under the Act, physicians face liability even if they act in good faith according to their own best medical judgment." *Id.* Without requiring the State to prove

beyond a reasonable doubt that the physician acted willfully or recklessly, in the context of abortion it is likely that the State could find an expert, regardless of the situation, to say that the doctor acted unreasonably. *Id.* at 205. Thus, "the objective standard combined with strict liability for even good faith determinations, could have a profound chilling effect on the willingness of physicians to perform abortions," even where they are constitutionally permitted. *Id.*

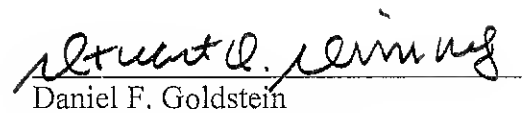
The Sixth Circuit's holding, which faithfully followed the Supreme Court's rationale, is equally applicable to the Maryland statutes at issue here. As the Supreme Court recognized, viability is an elusive concept that inherently requires consideration of too many variables to make it anything but a matter of medical judgment. Criminal liability based on an *ex post facto* assessment of that determination therefore makes the statute unconstitutionally vague.

The State cannot dispute that abortions before viability are a constitutionally protected activity. Here, because the definition of viability is too vague for a doctor to determine whether or not his or her conduct is immune from criminal prosecution, the chilling effect the statute would have on constitutionally protected abortions, especially if this prosecution were to stand, would create an undue burden on a woman's right to choose. Because of this chilling effect, the Court must strictly adhere to the doctrine of vagueness, ensuring that the possibility of variable enforcement of a statute will not prevent citizens from exercising their constitutional rights.

III. Conclusion

For the foregoing reasons, Dr. Riley respectfully requests the Court to dismiss the charges against her and grant such other relied as it deems necessary in the interest of justice.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 20th, 2012 a copy of the foregoing Motion to Dismiss Indictment and Statement of Points and Authorities was hand delivered to: Ellis Rollins III, State's Attorney for Cecil County, Courthouse, 129 E. Main Street, Elkton, Maryland 21921.

Stuart O. Simms

STATE OF MARYLAND	*	IN THE CIRCUIT COURT
Plaintiff,	*	OF MARYLAND
v.	*	FOR
NICOLA I.. RILEY	*	CECIL COUNTY
Defendant.	*	Case No. 07-K-11-002084

* * * ooo0ooo * * *

ORDER

Upon consideration of the Defendant's Motion to Dismiss Indictment and Statement of Points and Authorities and the Court having conducted a hearing and heard argument from counsel, it is hereby

ORDERED, this ___day of January, 2012 that the Defendant's Motion is granted and that bail is set in this matter at _____.

_____
Judge
Circuit Court for Cecil County

EXHIBIT A

Elkton Police Department

December 29th, 2011

Crime(s): Murder First Degree, Murder Second Degree, Conspiracy Murder First Degree

Date/Time: December 28th, 2011

Location: 126 E. High St.

Suspect(s): see below

Arrested: Steven Chase Brigham 55, of Voorhees, NJ
Nicola Irene Riley 46, of Salt Lake City, UT

Charges: Brigham: Murder First Degree x5
Murder Second Degree x5
Conspiracy Murder First Degree x1

Riley: Murder First Degree x1
Murder Second Degree x1
Conspiracy Murder First Degree x1

Summary: An Investigation into Doctor Steven Brigham and Doctor Nicola Riley began on August 13th, 2010, when a female patient was brought into the Union Hospital ER by Dr. Riley. The patient, a young adult female from out-of-state, was brought to Union Hospital from 126 E. High St., Elkton, due to complication resulting from a medical procedure being administered at 126 E. High St. The patient was later transported to John Hopkins Hospital in Baltimore. It was learned, the patient had been driven to 126 E. High St, Elkton from Voorhees, NJ to receive an abortion. The investigation revealed both Dr. Brigham and Dr. Riley were on the premises of 126 E. High St. at the time of this incident.

Due to the information gathered in the course of the investigation, on Tuesday, August 17th, 2010, the Elkton Police Department executed a search and seizure warrant on the medical clinic located at 126 E. High St., Elkton. During the search of the premises several fetuses were located in a freezer chest. The fetuses were removed to the Medical Examiner's Office in Baltimore.

As a result of a lengthy investigation; on December 28th, 2011, a Circuit Court Indictment Warrant (charges listed above) was received by the Elkton Police Department. Upon request for assistance, Dr. Brigham was located and apprehended by the Camden, NJ Homicide Division without

incident on the evening of December 28th, 2011. Dr, Brigham is currently being held as a fugitive at the Camden County jail and awaiting an extradition hearing.

Also, on December 28th, 2011, a Circuit Court Indictment Warrant (charges listed above) was received by the Elkton Police Department for Dr. Riley. Dr. Riley was located and apprehended by the Unified Police Department, UT without incident on the evening of December 28th, 2011. Dr. Riley is currently being held at the Salt Lake City Jail awaiting a Fugitive/extradition hearing.

Additional questions/information – referred to the Office of the State's Attorney for Cecil County, Deputy State's Attorney Kerwin Miller (410)996-5335

EXHIBIT B

SENATE JUDICIAL PROCEEDINGS COMMITTEE
BRIAN E. FROSH, CHAIRMAN · COMMITTEE REPORT SYSTEM
DEPARTMENT OF LEGISLATIVE SERVICES · 2005 MARYLAND GENERAL ASSEMBLY

FLOOR REPORT

HOUSE BILL 398

~~Homicide~~ Murder and Manslaughter - ~~Victim~~ – Viable Fetus

SPONSORS: Delegate Boutin, *et al.*

COMMITTEE RECOMMENDATION: Favorable

BILL SUMMARY:

This bill allows for the prosecution of murder or manslaughter of a viable fetus. A person prosecuted under the bill must have intended to cause the death of or serious physical injury to the viable fetus, or wantonly or recklessly disregarded the likelihood that the person's action would cause the death of, or serious physical injury to, the viable fetus. The bill does not apply to a woman's right to terminate a pregnancy, does not subject a physician or other licensed medical professional to liability for fetal death that occurs in the course of administering lawful medical care, does not apply to acts of a pregnant woman with regard to her own fetus, and may not be construed to confer personhood or any rights upon the fetus. The commission of first degree murder of a viable fetus under the bill, in conjunction with the commission of another first degree murder arising out of the same incident, does not constitute an aggravating circumstance subjecting a defendant to the death penalty.

COMMITTEE AMENDMENTS: None

CURRENT LAW:

A murder that is not first degree murder is considered second degree murder. A violator is guilty of a felony and subject to imprisonment for up to 30 years.

Manslaughter is a common law offense. The meaning accorded to involuntary and voluntary manslaughter is judicially determined and based on case law. The distinction generally depends on whether there was an intention to kill. Manslaughter generally is a felony and distinct from murder by virtue of the absence of malice. Voluntary manslaughter is distinguished from murder by absence of malice aforethought, express or implied, and by having a reasonable provocation.

Manslaughter, except for involuntary manslaughter, is a crime of violence for purposes of sentencing and parole laws. The crime is a felony, with a maximum penalty of 10 years imprisonment in a State facility, or two years detention in a local facility and/or a $500 fine.

The State may not interfere with a woman's decision to end a pregnancy before the fetus is viable or at any time during a woman's pregnancy if the procedure is necessary to protect the life or health of the woman or the fetus is affected by a genetic defect or serious deformity or abnormality. A viable fetus is one that has a reasonable likelihood of surviving outside of the womb.

A physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion made in good faith and in the physician's best medical judgment following accepted standards of medical practice.

BACKGROUND:

According to the Department of Health and Mental Hygiene's Office of Vital Statistics, there were 654 fetal deaths and 434 neonatal deaths in Maryland in 2001.

FISCAL IMPACT:

State Effect: Potential significant increase in general fund expenditures for the Office of Chief Medical Examiner (OCME). Potential minimal increase in general fund revenues and expenditures due to the expanded application of current law penalty provisions.

Local Effect: Potential minimal increase in local revenues and expenditures due to the expanded application of current law penalty provisions. Potential significant increase in expenditures for county medical examiners.

Small Business Effect: None.

ADDITIONAL INFORMATION:

Prior Introductions: A similar bill, HB 520 of 2004, received an unfavorable report in the House Judiciary Committee.

Cross File: None.

EXHIBIT C

CHARLES R. BOUTIN
House Chief Deputy Minority Whip
Legislative District 34A
Harford and Cecil Counties

Health and Government Operations Committee

Nursing Home Oversight Committee

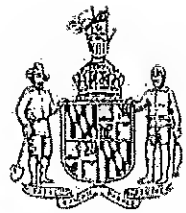
Health Insurance Subcommittee

Health Facilities, Equipment and Products Subcommittee

Long-Term Care Subcommittee

House Chairman, Republican PAC

House Chairman, Sportsmen's Caucus



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March 8, 2005

The Honorable Joseph Vallario
Chairman
Judiciary Committee
121 Lowe House Office Building
Annapolis, MD 21401

Re: HB 398 – Fetal Homicide

Mr. Chairman:

Thank you very much for the time allowed me to present this important bill.

As I indicated in the hearing, this is clearly and solely a victim's rights bill. It takes care of the "Laci Peterson" issue in Maryland, while protecting a woman's right to choose.

Amendments to protect the mother or physician from any prosecution are clearly friendly. I am available at any time to answer any remaining questions.

I urge a favorable report.

Yours very truly,

Charles R. Boutin
Delegate, District 34A

CRB/kbm

Cc: All Committee Members